

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY BONTEMPS,

Defendant and Appellant.

C065072

(Super. Ct. No.  
08F06199)

Defendant Gregory Bontemps appeals from his convictions for spousal abuse (Pen. Code, § 273.5, subd. (a); statutory citations that follow are to the Penal Code unless otherwise specified), making criminal threats (§ 422), and intimidating a witness (§ 136.1, subd. (b)(1)). He contends the trial court erred in admitting evidence of his criminal history, counsel was ineffective for failing to object to that evidence, and the trial court abused its discretion in denying his request that the court disregard for purposes of sentencing one or both of

his prior serious or violent felony convictions. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).) We affirm the judgment.

### FACTS AND PROCEEDINGS

In July 2008, Charlene and defendant, her then husband, got into an argument about her son, Anthony. Over the next few hours, Charlene and defendant both drank alcohol and continued to argue. After Charlene fell asleep, defendant woke her by grabbing her by the hair, pulling her into a sitting position and saying "Bitch, make me some dinner." Charlene fought back and defendant swung her down toward the ground and punched her in the back and in the nose. Blood gushed out of her nose covering her hands and face and spreading to her clothing, the sheets, the bedroom and bathroom floors, furniture, and the walls.

While her nose was still bleeding, defendant told her several times he would kill her. He also said if she called the police, she would be "done before they hit the corner." He told her if she called her son, he would kill her son as well. These threats frightened Charlene because of defendant's "violent criminal past." Accordingly, she did not immediately call the police or her son.

Defendant made Charlene clean the blood off herself, the floors, and the sheets. She continued to follow defendant's directions, because she remained afraid of him because of his "violent criminal past." After she cleaned up her blood,

defendant told her to lay down, which she did because she remained afraid of defendant because of his "violent criminal past." Eventually, she fell asleep. The following morning, when defendant left the house and went to the store, Charlene called 9-1-1 and defendant's parole agent to report the previous evening's assault. Then she called her son.

The police took Charlene's statement and photographs of her injuries. She had bruises on her leg and back, a contusion and swelling to her nose, a cut lip, and a sore head. Defendant was arrested away from the home.

Subsequently, Charlene visited defendant in jail, deposited money into his jail account, and wrote him letters. In those letters she told him she still cared for him, but was moving his things out of the home. Charlene acknowledged that while defendant was in jail, she cashed some of his worker's compensation checks and not all of the money went to defendant.

Charlene underwent domestic violence counseling, during which defendant wrote her letters trying to persuade her to drop the case, stay away from court and make herself unavailable. He assured her "it" would never happen again. Defendant also enlisted his mother's aid in attempting to convince Charlene to drop the charges against him.

Defendant sent Charlene numerous letters, including one in which he apologized for what had happened between them. Defendant called Charlene from jail up to 20 times a day, until she obtained a restraining order. In January 2009, Charlene

filed for divorce and the divorce was finalized in September or October 2009.

As noted, defendant was convicted of one count of spousal abuse (§ 273.5, subd. (a)), one count of criminal threats (§ 422) and one count of intimidating a witness (§ 136.1, subd. (b)(1)). In bifurcated proceedings, the court found true the allegation defendant had two prior strike convictions. Defendant was sentenced to a term of 25 years to life on each of the three convictions. The terms imposed for the spousal abuse and witness intimidation convictions were stayed pursuant to section 654.

## DISCUSSION

### I

#### *A "Violent Criminal Past"*

Defendant contends the court prejudicially erred in admitting bad character evidence about his criminal history, specifically his "violent criminal past." He also contends trial counsel was ineffective because he failed to object to the testimony or request a limiting instruction.

In pretrial motions, defense counsel sought to limit the evidence of defendant's prior felony convictions. He moved to bifurcate defendant's prior convictions, sanitize references to those convictions and exclude evidence of uncharged acts and defendant's parole status. In an Evidence Code section 402 hearing, Charlene testified she was aware of defendant's prior convictions, including two gang-related attempted murder

convictions in which he admitted shooting two people in the head. Although they were alive at the time of trial, defendant told her both victims ultimately died as a result of the injuries he inflicted. He also told her he felt guilty because his baby's mother jumped out of a three story building trying to escape him. Charlene testified her knowledge of defendant's past affected her fearfulness as a result of his threats.

The court granted defendant's motion to exclude references to his gang involvement and uncharged acts. However, the court found Charlene's knowledge of defendant's prior convictions was relevant on the sustained fear element of criminal threats and found it was admissible. Defense counsel and the prosecution then agreed that any reference to defendant's past convictions would be sanitized by using the phrase "violent criminal past." Defense counsel indicated he thought the word "violent" was better than "serious," as the latter could include sexual offenses.

Defendant argues that the evidence of his violent criminal past was not admissible under Evidence Code sections 1101 or 1109, as it did not prove motive, intent, plan or identity and did not qualify as prior acts of domestic violence. As defendant acknowledges, however, the evidence was not admitted as character evidence. Rather, the evidence was admitted for the purpose of establishing Charlene's state of mind as a result of defendant's threats, specifically, whether she was in sustained fear as a result of his threats. Defendant contends the evidence was not admissible for this purpose under Evidence

Code section 352, because it was highly inflammatory and unduly prejudicial.

We review a trial court's evidentiary rulings for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) All relevant evidence is admissible unless otherwise provided by statute. (Evid. Code, § 351.) Generally, evidence of a person's bad acts is inadmissible to prove a person's propensity to commit similar acts on a separate occasion. (Evid. Code, § 1101, subd. (a).) However, this rule does not affect the admissibility of evidence to prove some other relevant fact, such as an element of the offense. (Evid. Code, §§ 1101, subds. (b), (c), 210.) The court may exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

To establish the offense of making a criminal threat, the prosecution had to prove that defendant acted with the specific intent his statement be taken as a threat, that the threat caused Charlene to be in sustained fear and that her fear was reasonable under the circumstances. (§ 422.) A defendant's prior criminal and violent conduct are relevant to establish these elements. (*People v. Garrett* (1994) 30 Cal.App.4th 962, 966; see also *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) "Seldom will evidence of a defendant's prior criminal conduct be ruled inadmissible when it is the primary basis for establishing

a crucial element of the charged offense.” (*Garrett*, at p. 967.)

Here, defendant told Charlene he had shot two people in the head and been convicted of attempted murder. He also told her the mother of his child had jumped out of a three-story building to escape him. Then, in the course of a physical fight during which he punched her, grabbed her by her hair and bloodied her nose, he repeatedly threatened to kill Charlene and threatened to kill her son. Charlene’s knowledge of defendant’s violent criminal past, related to her personally by defendant, and the specific charges for which he was convicted were highly probative on each element of the charge of making a criminal threat: defendant’s specific intent that Charlene take his words as threats; whether she was in sustained fear as a result of those threats; and, whether that fear was reasonable.

(*People v. Garrett, supra*, 30 Cal.App.4th at p. 967.) That the evidence was also damaging to the defense does not make it unduly prejudicial within the meaning of Evidence Code section 352. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) Referring to defendant’s prior convictions for attempted murder as his “violent criminal past” rather than allowing reference to the specific convictions sustained lessened the damaging effect of the evidence without significantly reducing its probative value. Because the probative value of the evidence outweighed any prejudicial effect, the evidence was admissible and we find no abuse of discretion.

## II

### *Ineffective Assistance of Counsel*

As to defendant's claims that counsel was ineffective for entering into the stipulation that his criminal history would be referred to as his "violent criminal past" and his failure to request an "immediate" instruction limiting the jury's consideration of that evidence, we remain unpersuaded.

To prevail on a claim of ineffective assistance of counsel, "defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. [Citations.] Because we are limited to the record on appeal, if the record sheds no light on why counsel acted or failed to act in the manner challenged, then unless counsel were asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, we must reject the contention that counsel provided ineffective assistance." (*People v. Farnam* (2002) 28 Cal.4th 107, 201.)

Here, counsel's effort to sanitize defendant's criminal history was not ineffective assistance of counsel. To the contrary, the stipulation to have this evidence referred to as defendant's "violent criminal past," rather than allowing admission of the details of his history significantly reduced the potential inflammatory effect of the evidence. As above, the specific nature of defendant's criminal past and the fact



that he had shared that information with Charlene was relevant not only to Charlene's fear of defendant and whether it was reasonable, but also to defendant's specific intent. By virtue of counsel's stipulation, rather than being told defendant had two attempted murder convictions that he had told Charlene about, the jury learned only that he had an unspecified violent criminal history. This was a reasonable tactical decision for counsel to make.

Nor can we say that counsel's failure to request a limiting instruction concerning defendant's "violent criminal past" demonstrated ineffective assistance of counsel. "'A reasonable attorney may have tactically concluded that the risk of a limiting instruction . . . outweighed the questionable benefits such instruction would provide.' [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1053.) The evidence was admissible to establish the fact of Charlene's fear and the reasonableness of that fear under the circumstances. While the jury could not consider this evidence to show defendant was a person of bad character or disposed to violent behavior, there was no suggestion in this case that the evidence could be used for that purpose. Neither the nature of defendant's prior felony convictions nor the underlying conduct supporting them was before the jury. Defendant's prior criminal conduct was not a dominant part of the evidence against him, represented only a small portion of the trial testimony and as presented concerned only one of the several charges against defendant. Under the circumstances, counsel may have deemed it unwise to call further

attention to defendant's criminal history by requesting an instruction on it. (*People v. Hinton* (2006) 37 Cal.4th 839, 878; *Hernandez*, at p. 1053.) Counsel's tactical decisions were reasonable and did not render his provision of assistance ineffective.

### III

#### *The Romero Request*

Defendant next contends the court abused its discretion in denying his *Romero* motion. He claims the trial court relied too heavily on his prior criminal history and did not give "sufficient weight to the mitigating factors." He contends the "incident occurred as a result of unusual circumstances given that both the victim and [defendant] were drinking alcohol," most of his convictions were for nonviolent offenses, and his record was not increasing in seriousness.

A trial court has the discretion to strike a prior serious felony conviction for purposes of sentencing only if the defendant falls outside the spirit of the three strikes law. (§ 1385; *People v. Williams* (1998) 17 Cal.4th 148, 161; *Romero*, *supra*, 13 Cal.4th at pp. 529-530.) In ruling on a *Romero* motion, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies."

(*Williams*, at p. 161.) The court's discretion is limited by the concept of "furtherance of justice," requiring the court to consider both the defendant's constitutional rights and the interests of society. (*Romero*, *supra*, 13 Cal.4th at p. 530.) Furthermore, dismissal of a strike is a departure from the sentencing norm. As such, in reviewing a *Romero* decision, we will not reverse for abuse of discretion unless the defendant shows the decision was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Reversal is justified where the trial court was unaware of its discretion to strike a prior strike or refused to do so, at least in part, for impermissible reasons. (*Id.* at p. 378.) But where the trial court, aware of its discretion, "'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Ibid.*)

Here, the court considered the written motions, oral argument, defendant's statement in mitigation and supporting documentation, the probation report, a statement from defendant's mother and the evidence adduced at trial. The documentation provided by the defense was "incredibly thorough." In denying the motion, the court noted in particular the fact that defendant was on parole at the time he committed this offense, the number of convictions defendant had sustained and the number of acts of violence he had committed.

Defendant's prior convictions as an adult began in 1979. In 1987 he was convicted of burglary, when he broke into an ex-girlfriend's home, threatened her and her children and stole her television and furniture. He was granted probation and probation was revoked when he was convicted of possession of rock cocaine. Eight months after he was convicted of drug possession, he was convicted of vehicle theft. In February 1992, shortly after getting off parole, he committed a battery when he punched his then girlfriend several times in the face and threatened to kill her. He was granted probation. In October 1992 he was shooting dice with four other men. He got into an argument with two of the men and shot them both in the neck. One victim remained in a coma as a result of the shooting and the other became a paraplegic. While in prison on those charges, he was convicted of battery by a prisoner on an executive officer. He was originally released on parole in July 2007 and sustained a parole violation in September 2007. While in jail on the current charges, he assaulted another inmate and was given restriction for insubordination.

The probation report also indicated defendant had a high school diploma, had been married twice and had two adult children. He had been in the army and honorably discharged. Defendant sustained an injury in 2002 which precluded him from working. Defendant was also diagnosed with a brain disorder while in custody and was prescribed medication for that condition.

The court expressly considered defendant's constitutional rights and the interests of society, the nature and circumstances of defendant's current offenses and his prior convictions, the age of his prior convictions, the potential and actual violence of his convictions, his background, including "the scope and extent of his reformation," and whether the aggregate sentence defendant faced was unjust. Based on all these considerations, the court found defendant "clearly falls within the meaning [and] purpose" of the three strikes law.

The court here was clearly aware of its discretion, considered all the material before it, the relevant facts and circumstances and reached an impartial decision that defendant fell within the meaning of the three strikes law and denied his *Romero* motion. There was no abuse of discretion.

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_, J.

We concur:

\_\_\_\_\_, P. J.

\_\_\_\_\_, J.